STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY LEE WILLOUGHBY,

Defendant-Appellant

UNPUBLISHED
June 9, 2000

No. 215701
Delta Circuit Court
LC No. 98-006288-FH

Before: Hood, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

The jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to sixteen to thirty-four years' imprisonment. Defendant appeals by right and we affirm.

Defendant was convicted for stabbing his victim, Ty Beilby, while allegedly trying to get him to leave Rhea Dishno's house. Defendant stabbed the victim eight times in the chest, five times in the back and four times in the arm while the victim was lying on a bed in Dishno's house.

Defendant argues unpersuasively that his sentence of sixteen to thirty-four years imposed by the trial court violated the principle of proportionality. This Court reviews a trial court's sentence imposed on an habitual offender for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 626; 532 NW2d 831 (1995); *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997); *People v Milbourn*, 435 Mich 630, 653; 461 NW2d 1 (1990). A trial court does not abuse its discretion in sentencing an habitual offender within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society. *Hansford, supra* at 326.

Here, defendant was found guilty of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, which carries a maximum sentence of ten years. Under MCL 769.12(1)(a); MSA 28.1084(1)(a), a fourth habitual offender may be sentenced to imprisonment for life or for a lesser term where the underlying felony is punishable by imprisonment for a maximum of five

years or more. Defendant was sentenced to sixteen to thirty-four years' imprisonment. Given defendant's serious criminal history and the violent circumstances of this offense, it is apparent that defendant is unable to conform his conduct to the laws of society. *Hansford, supra* at 326. Defendant's sentence was proportionate. *Milbourn, supra* at 653.

Defendant also avers incorrectly that the trial court should have applied the new legislative sentencing guidelines in imposing sentence. However, the legislative guidelines do not apply to defendant. According to *People v Reynolds*, ___ Mich App ___; ___ NW2d ___ (Docket No. 211458, rel'd 3/17/00), slip op at 2, the statutory sentencing guidelines apply only to offenses committed on or after January 1, 1999. See also *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000); MCL 769.34(2); MSA 28.1097(3.4)(2). Defendant's offense was committed in 1997.

Defendant also says that the trial court erred when it denied defendant's motion for mistrial based on the failure of the prosecution to provide defendant with three pages of a transcript of witness Rhea Dishno's interview with the police. We disagree. This Court reviews a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

It has long been the law in this state that a defendant is entitled to have produced at trial all the evidence bearing on his guilt or innocence which is within the prosecutor's control. *People v Florinchi*, 84 Mich App 128, 133; 269 NW2d 500 (1978). MCR 6.201(A)(2) mandates that a party upon request must provide all other parties any written or recorded statements by a lay witness who the party intends to call at trial. If a party fails to comply with this rule, the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy. MCR 6.201(J). Thus, questions of noncompliance with discovery orders or agreements are subject to the discretion of the trial court and a trial court must exercise discretion in fashioning a remedy for noncompliance with a discovery statute, rule, order or agreement. *People v Clark*, 164 Mich App 224, 229; 416 NW2d 390 (1987); *People v Taylor*, 159 Mich App 468, 471; 406 NW2d 859 (1987). To fashion a remedy, the court must determine the legitimate interests of the court and the parties involved and how they may be affected by the remedial choices available. *Clark, supra* at 229. This discretion requires an inquiry into all the relevant circumstances, including the causes of the tardy or total noncompliance, as well as a showing by the objecting party of actual prejudice. *Davie, supra* at 598.

In *Clark*, the prosecution agreed to supply defense counsel with all medical documentation but failed to supply defense counsel with the results of a rape kit because the prosecution did not have the results of the rape kit until the trial began. The trial court reserved its ruling, allowing defense counsel to speak to the laboratory technician who examined the rape kit samples, and instructing the prosecution to have the technician available for questioning. *Id.* at 231. Defense counsel chose not to pursue the opportunity. The court granted a continuance to allow defense counsel time to consult with an independent expert; counsel chose not to do so. This Court found that although the discovery agreement had been violated, the remedies fashioned by the trial court were adequate and reversal was not required. *Id.* at 231-232.

In *People v Young*, 212 Mich App 630, 642; 538 NW2d 456 (1995), remanded on other grounds 453 Mich 976 (1996), the prosecutor learned how a witness would testify shortly before trial but did not inform the defendant of the nature of the testimony prior to trial. Since defendant had independent knowledge of the testimony, however, this Court found no abuse of discretion in the trial court's decision not to strike the testimony. *Id*.

People v Carter, 128 Mich App 541, 549; 341 NW2d 128 (1983), rev'd on other grounds sub nom *People v Woodward*, 422 Mich 941; 369 NW2d 852 (1985), involved a situation where the prosecutor failed to provide the defendant with a copy of the second side of a preliminary complaint report containing information regarding the seizure of a vial. The trial court found that defendant was not prejudiced by the technical violation of the discovery order. This Court agreed because the first page of the report ended in the middle of a sentence which should have alerted defense counsel to the fact that something was missing and the trial court held a hearing mid-trial on the legality of the seizure of the vial. *Id*.

Likewise, in *People v Snell*, 118 Mich App 750, 764; 325 NW2d 563 (1982), this Court concluded that, although the prosecutor failed to disclose certain statements made to a police officer, reversal was not required because the statements were contained in a police report.

Here, the prosecutor received a printout of a police report which included the missing transcript pages on August 10, 1998, the first day of trial. Defense counsel was supplied with a copy of the missing pages upon the prosecutor's discovery that they had not been previously supplied. Furthermore, as the trial court noted, the copy of the transcript originally supplied to defense counsel ended with an unanswered question, which should have put defense counsel on notice that something was missing. *Carter, supra* at 549. Counsel also had independent knowledge of the testimony because it was included in the police synopsis of Dishno's statement. *Young, supra* at 642. Under these circumstances, the trial court concluded that the prosecutor's failure to provide the three missing transcript pages was inadvertent and fashioned appropriate remedies by (1) allowing defense counsel time to review the missing pages to prepare for cross-examination of the witness regarding the statement; and (2) prohibiting the prosecution from using any statements from the missing material other than the quote of which defense counsel was put on notice. The trial court appropriately remedied the discovery problem and no abuse of discretion occurred.

As to the issues raised in defendant's supplemental brief on appeal, we have reviewed those claims and find no merit in them.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Peter D. O'Connell